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Supreme Court, U.S.
FILED

No. 07-061609 MAR 22 2007

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JONATHAN HAKALA,

Petitioner,

v.

J.P. MORGAN SECURITIES INC.,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Federal Arbitration Act, is the statute of limitations for filing to vacate, modify, or correct an arbitration award three months?

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PETITION FOR CERTIORARI

Petitioner Jonathan Hakala respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit (App., *infra*, 1a-5a) was entered on June 21, 2006 and is unreported. The denials of the petitions for panel rehearing and for rehearing *en banc* were entered on October 6, 2006 and December 22, 2006, respectively, and are unreported (App., *infra*, 8a-9a). The judgment of the District Court was entered on March 23, 2005 and is unreported (App., *infra*, 6a-7a).

JURISDICTION

The Court of Appeals entered its judgment in this case on June 21, 2006 and entered its denial of the petition for rehearing *en banc* on December 22, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 12 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §12, provides in pertinent part that: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered."

STATEMENT

Petitioner Jonathan Hakala was employed by Respondent J.P. Morgan Securities, Inc., and headed one of Respondent's trading desks. The dispute between the parties was submitted to arbitration by Petitioner, who appeared *pro se* throughout the arbitration and subsequent litigation. Petitioner's obligation to arbitrate arose when Petitioner applied to the National Association of Securities Dealers ("NASD") to register as a representative and principal of Respondent. It is

undisputed that the contract calling for arbitration evidenced a transaction affecting interstate commerce, and that diversity jurisdiction exists.

The arbitrators rendered a $795,400 award in favor of Petitioner plus some interest ("Award") on December 16, 2003. The NASD mailed the Award to Petitioner on December 19, 2003, who received it on December 24, 2003. The NASD's Code of Arbitration Procedure Rule 10330(h) provides that "monetary awards shall be paid within thirty (30) days of receipt unless a motion to vacate has been filed". Respondent never moved to vacate, and did not make any unconditional payment of the Award until October 7, 2004.

On March 24, 2004, Petitioner filed to vacate part of the Award in the United States District Court for the Southern District of New York. Subject matter jurisdiction in the District Court was based on 28 U.S.C. §1332. It is undisputed that Petitioner filed three months after he received the Award, and undisputed that Petitioner effected proper service within 120 days of filing. Respondent moved to dismiss the proceeding. The District Court granted Respondent's dismissal motion on the theory that a 90-day statute of limitations under New York Civil Practice Law and Rules §7511(a) applied, and had lapsed by a single day. Petitioner appealed to the United States Court of Appeals for the Second Circuit, which affirmed the District Court ruling. This petition for a writ of certiorari follows.

It may also be important to note that the Second Circuit's June 21, 2006 Summary Order ("Order") at 3 (App., *infra*, 3a) cited *Hakala v. Deutsche Bank AG*, 343 F. 3d 111 (CA2 2003), an appellate case decided in Petitioner's favor, as "applying C.P.L.R. §7511(a) to [the] timeliness issue". In that matter, Petitioner's then attorney had mistakenly "filed a new petition in New York State Supreme Court" (*id*, at 113) under C.P.L.R. §7511(a), having "failed to plead the basis of federal jurisdiction" (*id*, at 112), unlike the instant matter which has never been in state court. It is undisputed that

Petitioner's then attorney received the arbitration panel's decision on November 22, 1999, and filed Petitioner's original motion to vacate exactly three months (92 calendar days) later on February 22, 2000. The Second Circuit ruled in Petitioner's favor that his filing was indeed timely. *Hakala*, 343 F. 3d at 112, *supra*.

REASONS FOR GRANTING THE PETITION

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 55 (1995), this Court "granted certiorari" on another question regarding arbitration "because the Courts of Appeals have expressed differing views".

In the instant matter, the Courts of Appeals have expressed sharply differing views on whether the statute of limitations under the FAA for filing to vacate, modify, or correct an arbitration award is three months or 90 days. A writ of certiorari in the instant matter would help secure and maintain uniformity of Courts of Appeals decisions, and would help secure and maintain Courts of Appeals compliance with decisions of this Court.

Please compare *Sargent v. Paine Webber Jackson & Curtis, Inc.*, 882 F. 2d 529, 531 (CADC 1989), *cert. denied*, 494 U.S. 1028 (1990) (holding that motion to vacate within three months of movant's receipt was timely), *Wallace v. Buttar*, 378 F. 3d 182, 197 (CA2 2004) (ruling that in NASD arbitration, "party must move to vacate, modify, or correct award within three months of the award's issuance"), *Photopaint Technologies, LLC v. Smartlens Corp.*, 335 F. 3d 152, 156 (CA2 2003) (noting that in §12 of the FAA, "Congress used "must" in relation to the three-month period for filing a motion to vacate an arbitration award"), and *Sheet Metal Workers Int'l. v. Air Systems Engineering, Inc.*, 831 F. 2d 1509, 1510-11 (CA9 1987) (holding that §12 of the FAA precludes a motion to vacate an arbitration award after the three-month period has run); with *Prudential-Bache Securities, Inc. v. Tanner*, 72 F. 3d 234, 239 (CA1 1995)

(holding that "the text of [FAA] Section 12 is unambiguous, clearly setting out a 90-day time limit" and describing §12 as a "90-day provision"), *Sverdrup Corp. v. WHC Constructors, Inc.*, 989 F. 2d 148, 156 (CA4 1993) (referring to §12 period as "90 days"), and *International Union of Operating Engineers Local No. 841 v. Murphy Co.*, 82 F. 3d 185, 188 (CA7 1996) (referring to §12 as "the requisite 90-day limitation period" and concluding that "Murphy should have moved the district court within 90 days"). The Seventh Circuit even expressed differing views in that same opinion, when it also wrote that "Murphy ... should have moved ... within the three-month period".

The Seventh Circuit may have assumed that three months is the same as 90 days, but that is not usually the case. Every three-month period that excludes February 28th contains either 91 or 92 calendar days. Certain three-month periods that include February 28th also contain at least 91 calendar days (e.g., November 29th – February 28th), and most do in leap years. The difference has led to unnecessary litigation, and in the instant matter, threatens to deprive Petitioner of a valuable claim.

The Order also directly conflicts with a unanimous decision of this Court. In its Order at 3 (App., *infra*, 3a), the Second Circuit quoted completely out of context an Eleventh Circuit case, *American Postal Workers Union, AFL-CIO v. United States Postal Service*, 823 F. 2d 466 (CA11 1987), as evidence that §12 of the FAA "plainly requires service, rather than mere filing, within 3 months of the arbitration award". Precisely as in the instant matter, the American Postal Workers Union had filed actions in District Court seeking to vacate arbitration awards exactly 91 calendar days after they were delivered, where those 91 days were within the FAA's 3-month limitation period. As in the instant matter, the District Court dismissed the actions as untimely. *Id*, at 468 and 469.

In its judgment, and exactly contrary to the Order, the

Eleventh Circuit cited this Court's unanimous decision in *West v. Conrail*, 481 U.S. 35 (1987), when ruling that the appellant had indeed timely filed within the FAA's three-month limitation period:

> "[A] unanimous Supreme Court ... held that the action was timely when "commenced" within the meaning of Fed. R. Civ. P. 3, *i.e.*, the complaint was filed, within the limitations period, so long as proper service was effected within 120 days as provided in Fed. R. Civ. P. 4(j) ... Therefore, if the plaintiff filed its complaint to "commence" the action within three months (which it did), and effected proper service within 120 days of filing (which it did), then the actions are timely." *American Postal Workers*, 823 F. 2d at 476-477, *supra.*

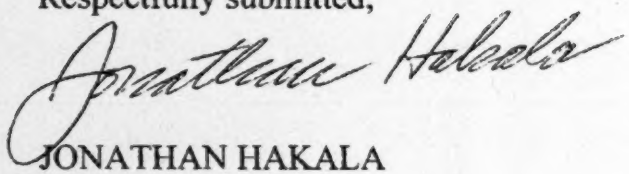
The Eleventh Circuit concluded based on this Court's unanimous opinion that "while we find it appropriate to "borrow" the period set out in the [FAA] rather than the Florida Statute, that borrowing does not include the service provision of the [FAA]." *Id*, at 469.

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983), this Court referred to an important statutory "congressional declaration of a liberal federal policy favoring arbitration". Maximizing confidence in the arbitration system helps maximize use of this form of alternative dispute resolution and helps resolve disputes that would otherwise be adjudicated through expensive and time-consuming litigation. The rules of the arbitration system, including the statute of limitations for filing to vacate, modify, or correct an arbitration award under the FAA, should be as clear and transparent as possible, in order to maximize public confidence and participation in favor of arbitration.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



JONATHAN HAKALA
Petitioner *Pro Se*

Dated: May 25, 2007

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of June, two thousand six.

PRESENT: HONORABLE RALPH K. WINTER,
HONORABLE REENA RAGGI,
Circuit Judges,
HONORABLE KENNETH M. KARAS,
District Judge.[1]

JONATHAN HAKALA,
Plaintiff-Appellant,
v. No. 05-3140
J.P. MORGAN SECURITIES, INC.,
Defendant-Appellee.

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[1] The Honorable Kenneth M. Karas, of the United States District Court for the Southern District of New York, sitting by designation.

APPEARING FOR APPELLANT: JONATHAN HAKALA, pro se, Hoboken, New Jersey.

APPEARING FOR APPELLEE: ROBERT S. WHITMAN, Orrick, Herrington & Sutcliffe, (Todd Gutfleisch, JP Morgan Chase Legal Department, *on the brief*), New York, New York.

Appeal from the United States District Court for the Southern District of New York (Lewis A. Kaplan, *Judge*, James C. Francis, *Magistrate Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court entered on March 23, 2005 is AFFIRMED.

Plaintiff-Appellant Jonathan Hakala petitioned the district court to confirm in part and vacate in part an arbitration award. The district court granted Hakala's petition insofar as it sought to confirm the award, but dismissed so much of the petition that sought to vacate or modify the award, concluding that the petition to vacate was untimely under New York Civil Practice Law and Rules (C.P.L.R.) § 7511(a). Hakala appeals the district court's dismissal of his petition to vacate. On appeal, Hakala contends, inter alia, that (1) the timeliness of his petition is governed by the three-month limitations period set forth in the Federal Arbitration Act ("FAA"), see 9 U.S.C. § 12, rather than the ninety-day statute of limitations in C.P.L.R. § 7511(a), and that, under the FAA, his petition was timely; and (2) even if New York's ninety-day statute of limitations applies, the district court nevertheless erred in concluding that his petition was untimely. On appeal of a district court's decision to vacate or confirm an arbitration award, we review the district court's findings of fact for clear error and its conclusions of law de novo. See 187 Concourse Assocs. v. Fishman, 399 F.3d 524, 529 (2d Cir. 2005). We assume the parties' familiarity with

the facts and the record of prior proceedings, which we reference only as necessary to explain our decision.

Section 12 of the FAA provides that, "[n]otice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12. As the district judge correctly recognized, by its plain language, § 12 applies only to notice, i.e., service, it does not apply to filing. See American Postal Workers Union, AFL-CIO v. United States Postal Serv., 823 F.2d 466, 470 (11th Cir. 1987) (noting that 9 U.S.C. § 12 "plainly requires service, rather than mere filing, within 3 months of the arbitration award" (emphasis in original)). To that extent, the ninety-day limitations period in C.P.L.R. § 7511 governs the timeliness of Hakala's petition. See generally Hakala v. Deutsche Bank AG, 343 F.3d 111 (2d Cir. 2003) (applying C.P.L.R. § 7511(a) to timeliness issue).

Pursuant to C.P.L.R. § 7511(a), "[a]n application to vacate or modify an [arbitration] award may be made by a party within ninety days after its delivery to him." Here, Hakala received the arbitration award on December 24, 2003. Although he mailed his petition to the Pro Se Clerk's Office on March 23, 2004, it was not received by the clerk's office, and thus not filed, see Greenwood v. State of New York, Office of Mental Health, 842 F.2d 636, 639 (2d Cir. 1988), until March 24, 2004, ninety-one days after he received the panel's award.

Notwithstanding the fact that his petition was filed one day after the statute of limitations expired, Hakala contends that the district court erred in dismissing his petition as untimely because, inter alia, factual issues remain as to whether his petition "should have been deemed filed on March 23, 2004." Specifically, Hakala contends that an unnamed employee in the Pro Se Clerk's office incorrectly advised him that he was required to serve his petition before it could be accepted for filing. Hakala argues that, but for the

employee's erroneous advice, he would have filed the petition on March 23, 2004, the last day of the limitations period. Hakala's argument is without merit.

The district court held an evidentiary hearing on the issue of timeliness. After the hearing, at which Hakala testified, the district court found that Hakala failed "to sustain his burden of establishing that the Pro Se Office refused to accept the complaint for filing on March 23, 2004 because it had not yet been served" and that there was "no credible evidence that it misled [him] in any way." March 18, 2005 Order at 2. Hakala offers no reason to disturb the district court's finding, and upon our independent review of the record, we cannot conclude that the district court clearly erred in finding that Hakala's failure timely to file his petition was not the result of misinformation from the Pro Se office.

Equally unavailing is Hakala's argument that the filing deadline should be tolled under the doctrine of "unique circumstances." Pursuant to that doctrine, filing deadlines may be excused where "a party has performed an act which, if properly done, would postpone the deadline for filing . . . and has received specific assurance by a judicial officer that this act has been properly done." Mendes Junior Int'l Co. v. Banco do Brasil, S.A., 215 F.3d 306, 315 (2d Cir. 2000) (recognizing that filing deadlines for federal appeals may be relaxed in "unique circumstances"); cf. Thompson v. INS, 375 U.S. 384, 386-87 (1964) (excusing an untimely notice of appeal because appellant had postponed filing in reliance on district court's specific assurance that he had properly presented motion to that court that would toll appellate filing deadline). Assuming the continued validity of the "unique circumstances" doctrine, see United States v. Canova, 412 F.3d 331, 346 n.17 (2d Cir. 2005) (noting that our sister circuits have questioned continued vitality of "unique circumstances" doctrine), it is not applicable in this case. As discussed supra, the district court explicitly rejected Hakala's contention that the Pro Se Office misled him about the filing

of his petition, and we have no reason to disturb the court's finding.

We have considered Hakala's remaining arguments, including his contention that February 29, 2004 should not be counted towards the ninety-day limitations period and that the time period should be equitably tolled, and largely for the reasons articulated by the Magistrate Judge and the district court, we conclude that none has merit. We further note that, while it is true, as Hakala contends, that we apply more lenient standards to pro se litigants, see Graham v. Henderson, 89 F.3d 75, 79 (2d Cir. 1996), such leniency does not extend to excusing Hakala's failure timely to file his petition in this case.

Finally, Hakala raises a number of arguments with respect to the merits of his petition to vacate. Because, like the district court, we conclude that Hakala's petition to vacate was untimely, we need not address these arguments.

The judgment of the district court, entered on March 23, 2005, is hereby AFFIRMED.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK
By: /s/ Lucille Carr

[Entry date June 21, 2006] [Deborah Holmes]

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JONATHAN HAKALA,

Plaintiff,

-against-

04 Civ. 2877 (LAK)

J.P. MORGAN SECURITIES, INC.,

Defendant.

----------x

ORDER

LEWIS A. KAPLAN, *District Judge*.

The Court held an evidentiary hearing, in accordance with its prior opinion, *Hakala v. J.P. Morgan Securities, Inc.*, No. 04 Civ. 2877 (LAK), 2005 WL 342104 (S.D.N.Y. Feb. 14, 2005), to determine whether the Pro Se Office refused to accept the complaint for filing on March 23, 2004 because it had not yet been served. At the conclusion of the hearing, defendant renewed its motion to dismiss the petition as untimely insofar as it seeks to vacate or modify the arbitration award. See *id.* at *5.

Plaintiff testified in substance that when he sought to file the action with the Pro Se Office on March 23, 2004, he was told that he first had to serve the complaint. The accuracy of this testimony is subject to quite substantial doubt.

First, under the Federal Rules of Civil Procedure service consists of delivery of a summons with a copy of the complaint. Fed. R. Civ. P. 4(c)(1). As the summons cannot be issued until the complaint is filed, Fed. R. Civ. P. 4(b), service cannot be made prior to the filing of the complaint. This of course is well known to the Pro Se Office, which accepts for filing prior to issuance of the summons and prior to service hundreds and perhaps thousands of *pro se* complaints every year.

Second, plaintiff did not identify, even by description let alone by name, the individual in the Pro Se Office to whom he attributes the statement in question. He did not call the individual as a witness.

Third, plaintiff testified, in an effort to corroborate his account to a later incident in which he allegedly advised another *pro se* litigant to serve his complaint before filing, accompanied the other individual to the Pro Se Office after he had done so, and then learned to his surprise that the complaint should have been filed first. But plaintiff did not identify this other individual, did not identify the Pro Se Office employee who allegedly set him straight, and did not call either as a witness. Nor did he suggest that the other individual was unavailable to testify.

Having heard the evidence, the Court finds that plaintiff has not sustained his burden of establishing that the Pro Se Office refused to accept the complaint for filing on March 23, 2004 because it had not yet been served and that there is no credible evidence that it misled plaintiff in any way. While the Court does not impute dishonesty to the plaintiff, it does bear in mind that recollections sometimes can be colored by self interest notwithstanding the utmost subjective good faith. Accordingly, defendant's renewed motion to dismiss so much of the petition as seeks to vacate or modify the arbitration award is granted on the ground that it is barred by the applicable statute of limitations.

As this order fully disposes of the last unresolved issue in this matter, the Clerk is directed to enter final judgment confirming the arbitration award in all respects.

SO ORDERED.

Dated: March 18, 2005

/s/ Lewis A. Kaplan
Lewis A. Kaplan
United States District Judge

[Entry date March 23, 2005]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

Date:

Docket Number: 05-3140-cv
Short Title: Hakala v. J.P. Morgan Securities Inc.
DC Docket Number: 04-cv-2877
DC: SDNY (NEW YORK CITY)
DC Judge: Honorable Lewis Kaplan

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 6th day of Oct. two thousand six.

HAKALA V. J.P. MORGAN SECURITIES

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Jonathan Hakala. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk
By: /s/ Arthur M. Heller
Motion Staff Attorney

[Order FILED DENYING petition for panel rehearing; entry date October 6, 2006] [AS]

[Order FILED DENYING petition for rehearing en banc, endorsed on motion dated 7/10/2006; entry date December 22, 2006] [Deborah Holmes]